SUPREME COURT, U. S.

No. 73-492

FEB 2 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

KUNSTSAMMLUNGEN ZU WEIMAR,

Petitioner,

—against—

FEDERAL REPUBLIC OF GERMANY, EDWARD I. ELICOFON and ELISABETH MATHILDE ISIDORE ERBGROSSHERZOGIN VON SACHSEN-WEIMAR-EISENACH (Grand Duchess of Saxony-Weimar),

Respondents.

BRIEF FOR PETITIONER IN RESPONSE TO REPLY BRIEF OF RESPONDENT ELICOFON

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On January 17, 1974, the Solicitor General filed a Memorandum for the United States as *amicus curiae,* stating that the Executive Branch would not object if petitioner were now granted leave to intervene and recommending that the petition for a writ of certiorari be granted, the judgment of the court of appeals vacated, and the case remanded to the district court with a direction that petitioner be permitted to intervene. On January 24, 1974, respondent Edward I. Elicofon submitted a reply brief in response to the Memorandum. This brief for petitioner responds to Elicofon's reply brief.

Elicofon faults the Solicitor General because he refuses to accept (as Elicofon has persistently urged) that the

rule excluding nonrecognized governments from suing in our courts is an absolute rule keyed to the formal act of executive recognition and tolerating no consideration whatever of executive policy short of formal recognition. The policy reasons for the rule, however, do not contemplate such inflexibility; and the opinions in *First National City Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759 (1972), to which Elicofon refers to support his view, make clear rather that in determining when and to what extent nonrecognized governments should be barred from the courts, views of the Executive Branch such as those here articulated are most pertinent.

Elicofon's reliance on the concurring and dissenting opinions in *First National City Bank* is, to say the least, disingenuous. For he wholly ignores the fact that the act of state doctrine and its policy underpinnings, which that case involved, are quite different from the nonrecognition rule and the policy considerations underlying it. The distinction was plainly articulated in the dissenting opinion of Justice Brennan (in which Justices Stewart, Marshall and Blackmun joined):

> "My Brother Rehnquist's opinion attempts to bolster its result by drawing an analogy between the act of state doctrine and the rule of deference to the Executive in the areas of sovereign immunity and recognition of foreign powers. That rule has itself been the subject of much debate and criticism. . . . The analogy, in any case, is not persuasive. When the Judicial Branch in the past has followed an Executive suggestion of immunity in behalf of a foreign government or accorded significant weight to the failure of the Executive to make such a suggestion, the result has been simply either to foreclose judicial consideration of the claim against that government or

to allow the suit to proceed on the merits of the claim and any other defenses the government may have. . . . Similarly, when the Judicial Branch has abided by an Executive determination of foreign sovereignty, the consequence has been merely to require or deny the application of various principles governing the attributes of sovereignty. . . . In no event has the judiciary necessarily been called upon to assess a claim under international law. The effect of following a 'Bernstein letter,' of course, is exactly the opposite—the Judicial Branch must reach a judgment despite the possible absence of consensus on the applicable rules, the risk of irritation to sensitive concerns of other countries, and the danger of impairment to the conduct of our foreign policy. . . ." (406 U.S. at 789-90, n. 13, citations omitted)

Justice Brennan pointed out that *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964), had held that in determining whether the courts should inquire into the validity of a foreign act of state, numerous circumstances* must be considered, and that the possible impairment of the Executive's conduct of foreign affairs is but "one—and *not necessarily the most important*—of those circumstances" (406 U.S. at 788, emphasis supplied). It was on this analysis that he concluded that the "Executive Branch . . . cannot by simple stipulation change a political question into a cognizable claim" (*id.* at 789) and that the "Bernstein exception" should be rejected. The phrases which Elicofon snatches from Justices Douglas' and Powell's

* For example, "the absence of consensus on the applicable international rules, the unavailability of standards from a treaty or other agreement, the existence and recognition of the Cuban Government, the sensitivity of the issues to national concerns, and the power of the Executive alone to effect a fair remedy for all United States citizens who have been harmed. . ." (406 U.S. at 788).

opinions reflect their agreement with the views of Justice Brennan in this regard (*id.* at 772, 774).

Moreover, the dissenting and concurring Justices in *First National City Bank* did not question that even where the act of state doctrine was concerned the views of the Executive should be considered. As Justice Brennan noted, "six members of this Court recognize today [that] the reasoning of that case [*Sabbatino*] is clear that the representations of the Department of State are entitled to weight for the light they shed on the permutation and combination of factors underlying the act of state doctrine" (*id.* at 790).*

In the circumstances of this case, the views of the Executive Branch (as now articulated by the Solicitor General) are not only entitled to consideration, they may well be controlling. For, in contrast to the factors relevant where the validity of an act of foreign state is in issue, the *sole* reason for preventing a nonrecognized government from suing is to avoid the embarrassment to and interference with the Executive's exercise of the foreign affairs function which might follow from judicial acceptance of a foreign government as litigant while the Executive refuses to recognize its sovereignty. Where the Executive advises the Court that it has no objection to admission of the nonrecognized government as a party, there can no longer be embarrassment to or interference with the Executive. Thus there is no longer any justification for denying the foreign government access to our courts.

Taking the Executive's views into account in such a case would not be abdicating the judicial function. Rather, to ignore a policy statement of the Executive Branch other

* See also, Powell, J., *id.* at 774. Justice Rehnquist (and the Chief Justice and Justice White, who joined in his opinion) would regard the Executive's views as determinative (*id.* at 767-68).

than the formal act of recognition and to refuse to permit a foreign government to sue despite the Executive's assurance that to do so would not interfere with his foreign affairs function shirks the courts' responsibility to decide cases where appropriate jurisdictional standards are met. See *First National City Bank* v. *Banco Nacional de Cuba*, 406 U.S. at 763; *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. at 408. Where, as here, the reason for denying the nonrecognized government its day in court—possible embarrassment to the Executive—no longer exists, refusal to adjudicate the foreign government's claim can no longer be justified.

Elicofon complains (Reply Brief, p. 3, n. 2) that the Solicitor General's recommendation that petitioner now be permitted to intervene is inconsistent with his belief that the decisions below were correct "on the record as it then stood" (Memorandum, p. 5, note). But there is no inconsistency. The recommendation is made on the basis not only of changes in the relations between the two Germanys (which Elicofon claims predated the decisions below), but also by the admission of the German Democratic Republic to membership in the United Nations with the affirmative approval and vote of the United States; the Federal Republic's readiness, should it prevail, to turn over the paintings in suit to the GDR*; and, most importantly, the Executive Branch's withdrawal of objection to petitioner's participation in the suit. These latter developments all postdate the court of appeals decision.

Elicofon's assertion that a remand "would reward calculated delay, prejudice private rights and subvert the

* There is no question, of course, that if petitioner were excluded from the action, Elicofon would promptly move also to exclude the Federal Republic on the ground that it has no claim of title to or interest in the paintings.

doctrine of finality" (Reply Brief, p. 5) deserves little comment. The judicial process has moved slowly in this case not—as Elicofon would have it—because petitioner "tardily . . . pressed its claim to litigant status", but rather because respondents have persistently sought to deprive petitioner of its litigant status on grounds we have consistently urged are without merit. Petitioner has complied with procedural rules at all times and has never improperly delayed the proceedings. And the suggestion that a remand would subvert the doctrine of finality disregards the well established principle that supervening events will be considered by an appellate court in determining a just disposition of the matter before it. See, *e.g.*, *McLeod* v. *General Electric Co.*, 385 U.S. 533 (1967); *Patterson* v. *Alabama*, 294 U.S. 600, 607 (1935); *Watts, Watts & Co.* v. *Unione Austriaca di Navigazione*, 248 U.S. 9, 21 (1918). If anyone has been prejudiced by the delay, it is petitioner, which has been forced to wait more than five years to press its claim of rightful ownership to the paintings.

CONCLUSION

For the reasons stated above, in the petition and in petitioner's supplemental brief, a writ of certiorari should issue, the judgment of the court of appeals should be vacated, and the case should be remanded to the district court with directions to grant petitioner's motion for leave

to intervene in the Federal Republic action (69-C-93) and to vacate the order of dismissal in the independent action (69-C-370).

Respectfully submitted,

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February 4, 1974